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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,

Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Guam Public Law 20-134 prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if two physicians, who practice independently of each other, "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." Abortions allowed by P.L. 20-134 must be performed in "an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam." In this facial challenge, the court of appeals affirmed the district court's judgment declaring the law unconstitutional in its entirety and permanently enjoining its enforcement.

Whether Guam P.L. 20-134 is unconstitutional in all of its possible applications, before and after viability; and, if not, whether it may be enforced in its constitutionally permissible applications.

(i)

PARTIES TO THE PROCEEDINGS

Petitioner is the Honorable Joseph F. Ada, Governor of Guam.

Respondents are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; The Rev. Milton H. Cole, Jr.; Laurie Konwith; Edmund A. Griley, M.D., William S. Freeman, M.D., and John Dunlop, M.D.; on behalf of themselves and all others similarly situated, and all their women patients.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Honorable Joseph F. Ada, Governor of Guam, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 16, 1992.

OPINIONS BELOW

The April 16, 1992, opinion of the United States Court of Appeals for the Ninth Circuit (as amended by an order of June 8, 1992), affirming the judgment of the district court declaring Guam Public Law 20-134 unconstitutional and permanently enjoining its enforcement, is not yet reported but is reproduced in the Appendix to this Petition as Appendix A. The opinion of the United States District Court for the District of Guam is reported at 776 F. Supp. 1422 (D. Guam 1990), and is reproduced in the Appendix to this Petition as Appendix B. The amended

judgment of the district court, entered on October 16, 1990, is reproduced in the Appendix to this Petition as Appendix C.

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 16, 1992. This Petition is being filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Guam Organic Act, 48 U.S.C. § 1421b(u) (1988):

The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

Guam Public Law 20-134, reproduced in the Appendix to this Petition as Appendix D.

STATEMENT OF THE CASE

This Petition concerns a facial challenge to the constitutionality of Guam Public Law 20-134, which prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." P.L. 20-134, §§ 2, 3. Petitioner is Joseph F. Ada, Governor of Guam, who exercises the "executive power of Guam" and is "responsible for the faithful

execution of the laws" of the territory. Guam Organic Act, 48 U.S.C. § 1422 (1988).

On March 19, 1990, Governor Ada signed into law Substitute Bill 848, which was unanimously passed by the Guam Legislature on March 8, 1990. Section 1 sets forth legislative findings that "[the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being." P.L. 20-134, § 1. The stated purpose of the law is "to protect the unborn children of Guam." *Id.* The term "unborn children" includes "any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development." *Id.*

Section 2 defines abortion as "the purposeful termination of a human pregnancy—after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus." *Id.* Thus, P.L. 20-134 does not restrict the use of contraceptives. Section 2 specifically excludes from the definition of abortion "medical intervention" in an ectopic pregnancy and in any other pregnancy if two physicians who practice independently of each other "reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair [her] health." *Id.* Abortions allowed by § 2 must be performed in "an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam." *Id.*

Section 3 makes it a felony to perform an "abortion" as that term is defined in § 2. *Id.*, § 3. If a licensed physician performs an illegal abortion, "the Guam Medical Licensure Board shall take appropriate disciplinary action." *Id.*¹ Sections 4 and 5 prohibit solicitation of

¹ A physician is not subject to disciplinary action for violating P.L. 20-134 unless he has been convicted in a criminal prosecution. 10 Guam Code Ann. § 12221(a) (1982).

abortion by a pregnant woman or anyone else. *Id.*, §§ 4, 5.² Section 6 repeals an earlier Guam law, and § 7 provides for a public referendum on whether P.L. 20-134 should be repealed “in its entirety.” *Id.*, §§ 6, 7.

On March 23, 1990, four days after the law went into effect and before it had been enforced against any of the plaintiffs or their patients, plaintiffs filed a federal class action against defendant and other public officials challenging P.L. 20-134 as violative of the United States Constitution, the Civil Rights Act (42 U.S.C. § 1983 (1988)), and the Guam Organic Act (48 U.S.C. § 1421 *et seq.* (1988)). The district court had subject matter jurisdiction. 28 U.S.C. § 1331 (1987). On the same date, the court granted plaintiffs’ request for a temporary restraining order enjoining enforcement of the law.

Plaintiffs moved for summary judgment and a permanent injunction on a variety of constitutional grounds, and for summary judgment under 42 U.S.C. § 1983. In addition to opposing plaintiffs’ motions, defendant filed a motion for partial summary judgment—arguing that *Roe v. Wade*, 410 U.S. 113 (1973), does not apply to Guam—and a combined motion to dismiss him in his personal capacity and to dismiss plaintiffs’ action under 42 U.S.C. § 1983.

In its “Decision and Order” entered on August 23, 1990, the district court held that *Roe v. Wade* applies to Guam; that P.L. 20-134 violates *Roe*; that the solicitation provisions of the law (§§ 4, 5) violate the Free Speech Clause of the First Amendment; and that the Governor is subject to injunctive relief under 42 U.S.C. § 1983 when acting in his official capacity. Appendix B.³ The court did not address any of plaintiffs’ other constitutional claims.

² The constitutionality of these sections is not at issue in this appeal.

³ The district court also held that the Governor could not be enjoined, as an individual, from enforcing the provisions of the law, a holding plaintiffs did not appeal. Appendix B at 32a-34a.

However, in *dicta*, the district court questioned whether the law violated the Establishment Clause and whether certain language in the law is impermissibly vague. Appendix B at 20a-21a & 28a n.7. Because of the court’s judgment, the public referendum on whether P.L. 20-134 should be repealed was never held.⁴

Defendant filed a timely notice of appeal. Appendix E. In his appeal, defendant argued that *Roe* does not apply to Guam; he argued in the alternative that P.L. 20-134 is constitutional on its face under the standard of review applicable to abortion statutes, as modified by this Court’s decisions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990); and *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1990) (*Akron Center II*). Defendant argued further that he is not subject to suit under 42 U.S.C. § 1983,⁵ and that P.L. 20-134 does not violate the Establishment Clause and is not impermissibly vague. Defendant did not appeal that portion of the judgment declaring the solicitation provisions (§§ 4, 5) unconstitutional. Consequently, no free speech issues are presented here. Likewise, no pregnant woman could be prosecuted for violating the law even if the provisions which are being appealed are allowed to go into effect by this Court.

On April 16, 1992, the court of appeals affirmed the district court’s judgment. The court held that the unappealed solicitation provisions are severable from the remainder of the law (Appendix A at 5a-7a); that *Roe v. Wade* applies to Guam (*id.* at 7a-8a); that defendant may be sued for prospective relief under 42 U.S.C. § 1983 (*id.* at 8a-10a); that P.L. 20-134 is unconstitutional under

⁴ As the court of appeals noted (Appendix A at 6a n.3), “no issue of ripeness” is presented because “[t]he provision for a referendum did not delay the effective date of the Act.”

⁵ Defendant did not question the district court’s general equitable power to grant prospective relief under 28 U.S.C. § 1331, but only the applicability of 42 U.S.C. § 1983.

Roe (*id.* at 10a-12a); and that *Roe* was not modified by this Court's decisions in *Webster*, *Hodgson*, or *Akron Center II* (*id.* at 12a-15a). Thus, the judgment of the district court permanently enjoining P.L. 20-134 was affirmed. *Id.* at 15a. The court of appeals expressly declined to rule on any of the alternative grounds for affirmance urged by plaintiffs. *Id.* at 15a n.10.

Petitioner seeks review of the court of appeals' judgment that P.L. 20-134 is unconstitutional. Petitioner does not seek review of the court of appeals' judgment that the abortion jurisprudence of this Court applies to Guam, or that he is subject to prospective relief under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER, IN THIS FACIAL CHALLENGE, GUAM P.L. 20-134 HAS ANY CONSTITUTIONAL APPLICATIONS.

This Petition asks the Court to review Guam P.L. 20-134, which prohibits abortion except (i) in cases of ectopic pregnancy or (ii) in any other pregnancy after implantation if there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair her health. P.L. 20-134, §§ 2, 3. This is the first time since *Roe v. Wade*, 410 U.S. 113 (1973), that the Court has been asked to rule on the constitutionality of a statute that *prohibits* abortion, and does not merely *regulate* its practice. Of necessity, the Petition begins with the Court's recent decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Nos. 91-744, 91-902 (June 29, 1992).

In *Casey*, the Court upheld all of the challenged provisions of the Pennsylvania Abortion Control Act of 1982, as amended, except the requirement of spousal notice. Unlike the statute which is the subject of this Petition, the statutory provisions at issue in *Casey* did not purport

to prohibit abortion.⁶ *Roe* was not directly implicated by the Pennsylvania regulations, all of which could have been upheld without overruling *Roe*.

Nevertheless, the Joint Opinion decided to reevaluate *Roe* and adhere to what it variously described as its "central" or "essential" holding—that viability marks the frontier between constitutional and unconstitutional prohibitions of abortion.⁷ Invoking principles of *stare decisis*, the Joint Opinion retained the viability component of the otherwise discarded trimester framework and concluded that "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Joint Op. at 36. In contrast to this seemingly absolute approach to the State's ability to prohibit pre-viability abortions, the Joint Opinion stated that "[e]ven the broadest reading of *Roe* . . . has not suggested that there is a constitutional right to abortion on demand," citing *Doe v. Bolton*, 410 U.S. 179, 189 (1973). *Id.* at 45. Thus, it would appear that at least some abortions may be prohibited prior to viability, though this Court has provided little guidance on this point.

Petitioner asks the Court to grant review of the Ninth Circuit's judgment to answers questions that were not directly presented or actually decided in *Casey*, and to resolve other questions of enforcement and regulation that were left in doubt.

⁶ In *Casey*, plaintiffs did not challenge those provisions of the Act which prohibit sex-selective abortions and abortions after twenty-four weeks gestation. Pa. Stat. Ann. tit. 18, §§ 3204(c), 3211 (Purdon 1991). Nevertheless, plaintiffs maintained in this Court that a ban on sex-selective abortions violated *Roe*. Reply Br. at 11 n.20.

⁷ *Casey*, Nos. 91-744, 91-902, slip op. at 3-4, 11, 18, 27, 28, 29, 31, 36-37 of Joint Opinion (hereinafter Joint Op.).

Plaintiffs challenged Guam P.L. 20-134 on its face.⁸ In a facial challenge, plaintiffs must show that "no set of circumstances exists under which the Act would be valid." *Webster*, 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That the Act "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*, quoting *Salerno*. See also *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Akron Center II*, 110 S.Ct. at 2980-81. Rather, plaintiffs must show that the law is "unconstitutional in every conceivable application." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).

Thus, the threshold question is whether P.L. 20-134 has *any* constitutional applications. Unless *Roe* and *Casey* stand for the proposition that *no* abortions may be prohibited, it clearly does.

For example, Guam could prohibit *some* previability abortions. Generally, these might be characterized as those abortions which are not "necessary." In *Doe*, the Court upheld a state abortion statute which, as modified by the district court, prohibited abortion unless a physician, using his "best clinical judgment," determined that it was "necessary." 410 U.S. at 191-92. This "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* at 192. Although, under *Doe*, the range of factors the physician may consider in determining whether an abortion is "necessary" to a woman's health is very broad, it is not boundless. At least *some* abortions are performed

⁸ During the four days the law was in effect, P.L. 20-134 was not enforced against any of the plaintiffs or any of their female patients. Plaintiffs challenged the law on its face, not as it applies to any particular woman seeking an abortion for any specific reason. Alleging that the law is unconstitutional *in toto*, plaintiffs sought declaratory and injunctive relief against the law in its entirety, and not as it may apply under any given set of circumstances.

for reasons which must be considered to be *unrelated* to the woman's health, no matter how broadly "health" is construed. These would certainly include abortions performed because of the unborn child's gender⁹ or those

⁹ The problem of sex-selective abortion is not a theoretical one. Despite the lack of any nexus to maternal health, some women do request abortion solely because the unborn child is the "wrong" sex. See, e.g., N.Y. Times, Dec. 25, 1988, at 1, col. 1 ("[M]any doctors are providing prenatal diagnoses to pregnant women who want to abort a fetus on the basis of sex alone.") and *id.* at 16, col. 4 ("[E]very one of more than a dozen geneticists interviewed said they regularly receive requests for prenatal diagnosis for sex selection."). See also, Elliot, *Abortion for "Wrong" Fetal Sex: An Ethical-Legal Dilemma*, 242 J.A.M.A. 1455 (1979); Fletcher, *Ethics and Amniocentesis for Fetal Sex Identification*, 301 N. Eng. J. Med. 550 (1979); Note, *Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know*, 56 Ind. L.J. 281 (1981); *Prenatal Diagnosis for Sex Choice*, 10 Hastings Center Rep. 15, 17-20 (Feb. 1980); *Chorionic Biopsy in Demand to Assess Sex*, 19 Ob.Gyn. News, Aug. 1-14, 1984, at 3, 33.

Moreover, there is evidence that abortion for this reason is gaining in acceptance. See Wertz & Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, 19 Hastings Center Rep. 21 (May/June 1989). "[N]ational surveys in 1973 and 1988 by social scientists and medical and ethics researchers indicate that the percentage of geneticists who approve of prenatal diagnosis for sex selection rose from 1% in 1973 to nearly 20% in 1988." N.Y. Times, Dec. 25, 1988, at 1, col. 1. And some physicians are remarkably candid about their willingness to perform abortions for this reason:

Dr. Michael A. Roth, an obstetrician in Detroit, said he sees no reason to object to sex selection. He will do prenatal diagnosis or refer patients elsewhere for it, and then do abortions if the women request them. "I have no ethical problems with it, absolutely not," he said. "I think that abortion should be available on demand."

N.Y. Times, Dec. 25, 1988, at 16, col. 4.

At least two states have tried to prohibit this form of sex discrimination through legislation. See Ill. Ann. Stat. ch. 38, § 81-26 § 6(8) (Smith-Hurd Supp. 1992); Pa. Stat. Ann. tit. 18, § 3204(c) (Purdon 1991). Enforcement of the Illinois statute has been enjoined. *Herbst v. Daley*, No. 84 C 5602 (N.D. Ill. 1984) (LEXIS, Genfed library, Dist. file).

performed on a woman who has become pregnant for the sole purpose of aborting and selling the unborn child's body parts for experimental purposes.¹⁰

Moreover, recognizing a right to abortion in such circumstances cannot be reconciled with the Court's understanding of abortion as a "medical decision" which calls for the exercise of the professional judgment (not merely the technical skills) of a physician. *Roe*, 410 U.S. at 166 (emphasis supplied). In summarizing its holdings, the Court in *Roe* said, "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the *medical judgment* of the pregnant woman's attending physician." *Id.* at 164 (emphasis supplied). See also, *Colautti v. Franklin*, 439 U.S. 378, 387 (1978) ("the abortion decision in all its aspects is inherently, and primarily, a medical decision").

Unless abortions performed for these and other reasons for which there is no possible health justification are protected by the Constitution, Guam P.L. 20-134 has *some*

¹⁰ Partly in response to public advocacy of the selling of fetal body parts (see Nat'l L.J., Dec. 7, 1987, at 1, 32-33), and because of concerns regarding fetal tissue experimentation and research, at least sixteen States have passed laws banning the sale and use for experimental purposes of fetal body parts obtained through induced abortions. See, e.g. Mass. Ann. Laws ch. 112, § 12J(a)(IV) (Law. Co-op. 1980) Mo. Rev. Stat. § 188.036 (1992); N.D. Cent. Code § 14-02.2-02 (1991).

As in the case of sex-selective abortions, there is evidence that the fears motivating the passage of this legislation are legitimate:

Both feminists and medical ethicists worry that, without proper restrictions, women could be coerced into becoming pregnant in order to donate tissue to a loved one. In fact, some women don't need to be coerced at all. On an ABC *Nightline* broadcast, Rae Leith, a woman whose father suffers from Parkinson's disease, said she'd willingly become pregnant and abort if she could donate the fetal tissue to her father. Some diabetic women are said to have considered impregnation in order to produce tissue for self-treatment.

Orenstein, *Health*, Vogue, Oct. 1989, at 298, 300.

constitutional applications, even before viability. A contrary conclusion (i.e., that any reason will suffice) is tantamount to recognizing a right to abortion on demand, which the Court has expressly disavowed. *Roe*, 410 U.S. at 153-55 (rejecting plaintiff's claim that a woman has an "absolute" right to abortion "at whatever time, in whatever way and for whatever reason she alone chooses"); *Doe*, 410 U.S. at 189; *Colautti*, 439 U.S. at 386-87; *Casey*, Joint Op. at 45. That is sufficient to sustain the constitutionality of Guam's law in this facial challenge.

Guam P.L. 20-134 also has constitutional applications after viability. In *Casey*, the Court "confirm[ed]" the power of the State "to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health." Joint Op. at 4; *id.* at 36-37. Section 2 of the Guam law contains exceptions for "those rare circumstances in which the pregnancy is itself a danger to [the woman's] own life or health." Joint Op. at 8.¹¹ Whether this law is constitutional and enforceable with respect to post-viability abortions depends upon the answers to two questions that were not raised or addressed in *Casey* or any other opinion of the Court.

First, may Guam enforce P.L. 20-134 after viability and limit post-viability abortions to those circumstances where there is a "substantial risk" that continuance of the pregnancy would "endanger the life of the mother" or "gravely impair" her health? Second, may Guam require that such abortions be performed only in an approved hospital or adequately-equipped clinic, and upon the concurrence of a second physician that these health risks exist? Guam and other American jurisdictions need

¹¹ See also, *Planned Parenthood of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 484 n.7 (1983), (referring to "those rare situations where there are compelling medical reasons for performing an abortion after viability").

guidance from the Court regarding the scope of the post-viability health exception required by *Roe* and *Doe*, and the extent to which therapeutic abortions may be regulated after viability.

There is considerable confusion as to what the term "health" means in the context of post-viability abortions. In *Doe*, the Court fashioned a definition of "health" to cure a *vagueness* problem in the Georgia abortion statute once the statutory exceptions in the law had been declared unconstitutional.¹² The Court stated: "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. at 192. However, it is not clear that the *Doe* Court intended the above statement to serve as a definition of the health-related abortions the States must allow after viability. Nevertheless, lower federal courts have consistently relied upon this language to invalidate legislative efforts to limit post-viability abortions.

For example, in *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980), the court struck down a Louisiana statute that allowed post-viability abortions only if they were necessary "to prevent permanent impairment to [the woman's] health." The court stated that "[p]reserving maternal health means more than preventing permanent incapacity," and held that under *Doe*, an exception for temporary incapacity had to be allowed, as well. *Id.* at 196. In *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983), the court declared unconstitutional a statute that prohibited abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially en-

¹² *Doe*, 410 at 191-92. See also *Colautti v. Franklin*, 439 U.S. 379, 387 (1979) (in *Doe v. Bolton*, "the Court discussed, in a vagueness-attack context, the Georgia statute's requirement that a physician's decision to perform an abortion must rest upon 'his best clinical judgment'").

dangers her life or health." The court found that, under *Doe*, the danger could not be limited to those that are "substantial" and "imminent." *Id.* at 525. Finally, in *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit noted that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus." *Id.* at 298. The court stated in *dicta* that if Pennsylvania had attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Doe*. *Id.* at 299.

Guam P.L. 20-134 does not allow abortions for "psychological or emotional reasons." Rather, continuance of the pregnancy *itself* must create a "substantial risk" of danger to the mother's life or grave impairment to her health, *i.e.*, there must be a substantial risk of grave *physical* impairment. If the broad definition of "health" in *Doe* applies after viability, as the lower federal courts have held, then the Guam law cannot constitutionally be applied in all instances after viability. On the other hand, if P.L. 20-134's narrower definition is constitutionally permissible, then the law may be enforced in all of its applications after viability and it should not have been enjoined, at least with respect to post-viability abortions. The Court should grant the Petition to clarify the law regarding the authority of the States to prohibit post-viability abortions, and to affirm that their authority to do so is real, not illusory.

Assuming that Guam's abortion prohibition has constitutional applications after viability, the Court still needs to determine the degree to which Guam can regulate those abortions that are expressly permitted. Abortions allowed by the law must be performed in an approved hospital or adequately-equipped medical clinic, upon the concurrence of a second physician that the circumstances justifying the abortion exist. P.L. 20-134, § 2. In *Doe*, the Court held a second, concurring physician requirement unconstitutional, but application of such a require-

ment to post-viability abortions has never been addressed by this Court. It would appear to be constitutional, though.¹³

From *Roe* to *Casey*, the Court has rejected the proposition that abortions must be permitted for any reason whatsoever. As a result, Guam P.L. 20-134 has constitutional applications, at least in some circumstances. That is sufficient to withstand a facial challenge. Thus, the court of appeals erred in affirming the district court judgment declaring the law unconstitutional on its face and permanently enjoining its enforcement.

Furthermore, guidance from the Court is necessary and review should be granted to end the uncertainty over whether there is a right to abortion on demand prior to viability, and whether post-viability abortions may be limited to serious physical reasons. In *Casey*, the Joint Opinion acknowledged that "the need for [judicial] review [of state laws affecting abortion] will remain as a consequence of today's decision." Joint Op. at 13. The Court can begin to meet that need by granting this Petition. Neither Guam nor any other American jurisdiction should be required to engage in endless rounds of legislation and litigation to discover which abortions may or may not be prohibited. Since Guam's law prohibits all

¹³ A requirement that therapeutic abortions be performed in hospitals or clinics would appear to be constitutional, if limited to post-viability abortions. See *Simopoulos v. Virginia*, 462 U.S. 506, 510-19 (1983). In *Webster*, the Court upheld regulations on the medical determination of whether a particular child is viable and stated that the "testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality." 492 U.S. at 520. Similarly, in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983), the Court upheld a second-physician requirement for post-viability abortions because it "reasonably further[ed] the State's compelling interest in protecting the lives of viable fetuses." *Id.* at 486. So too, the requirement of a second-physician concurrence in P.L. 20-134 ensures that viable unborn children are not aborted except for serious medical reasons.

abortions that are not protected by the Constitution, it presents these issues for the Court's review, and a full hearing on the merits is warranted.

II. THE COURT SHOULD GRANT REVIEW TO RE-EXAMINE THE VALIDITY OF VIABILITY AS A MEANINGFUL CONCEPT RELATIVE TO THE STATE'S INTEREST IN PROTECTING UNBORN HUMAN LIFE.

In *Roe*, the Court held that States generally cannot prohibit abortion before the point of viability. *Roe*, 410 U.S. at 163. (Though, as argued in Part I of this Petition, there may be some limited specific circumstances under which pre-viable abortions may be prohibited). It is generally accepted that viability (that time when the child can survive if born prematurely) occurs at about the 24th week of pregnancy. Thus, according to *Roe*, an unborn child may be aborted throughout roughly the first six months of pregnancy. The Joint Opinion in *Casey* reaffirmed this holding. Joint Op. at 3-4, 36.

As set forth in greater detail below, however, the Court has never satisfactorily explained its reasons for choosing the point of viability as the time when the State's interest in protecting the lives of unborn children becomes sufficiently compelling to allow abortion to be prohibited. Despite the Court's recent reaffirmation of the viability concept in *Casey*, Petitioner respectfully requests that the Petition be granted to allow the Court to examine more carefully the validity of *Roe*'s reliance on viability. Petitioner believes that he is justified in making this request for three reasons.

First, it was unnecessary for the Court to decide this issue in *Casey* because none of the challenged provisions drew it into question. Thus, the Court's statements with respect to viability in *Casey* may be considered by some courts as *dicta*. Accordingly, it would have been preferable for the Court to follow Justice O'Connor's admonition in *Webster*. There, Justice O'Connor declined to reexamine *Roe* stating:

When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. *And to do so carefully.*

492 U.S. at 526 (emphasis supplied). When the Court reaches out to decide an issue that has not been briefed or argued in the case before it, it is more likely to reach an erroneous result due to the lack of an adequate factual record and the lack of well-developed legal arguments.

Second, the Joint Opinion correctly notes that ultimate public acceptance of a decision depends upon its principled justification. It further notes that "[b]ecause not every conscientious claim of principled justification will be accepted as such, the justification must be beyond dispute." Joint Op. at 23. Accordingly, the Joint Opinion continues: "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures." *Id.* Public acceptance of the validity of the viability criterion can be obtained only upon a full and **fair evaluation of its merits.**

Finally, if the Court determines that a principled justification for the viability concept cannot be found, then this aspect of *Roe*, like the other aspects of the trimester framework, should be abandoned. Petitioner then would be allowed to enforce the Guam abortion law to a fuller extent than would presently appear possible.

A. The Court has not Yet had an Opportunity to Examine Fully and Fairly the Validity of the Viability Concept. Nor has the Court Provided A Principled Justification for it Sufficient to Achieve Public Acceptance of it.

The issue of whether viability represents a meaningful point at which to find that the State's interest in protecting prenatal life is compelling has never been extensively briefed or argued by the parties in any case before the

Court, including *Roe*¹⁴ and *Casey*.¹⁵ Because of this, the Court has never had an opportunity to evaluate carefully the significance of viability, if any, or to provide a principled justification for its application which is "beyond dispute."

The fact that this issue has never been thoroughly examined and tested against competing legal argumentation, is particularly troubling since the Joint Opinion finds that "*Roe's* central holding [is] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." Joint Op. at 18. (emphasis supplied).

Moreover, the *Casey* Joint Opinion provides little defense for selecting viability beyond quotation of the brief statements contained in *Roe*. And, in doing so, it fails to convey a conviction that *Roe's* reliance upon viability is principled "beyond dispute." Joint Op. at 23. Not only is the issue treated in four scant paragraphs of the 73 page Joint Opinion, but the equivocal nature of the statements contained therein suggests a deep-seated unease over the correctness of viability as an appropriate or principled dividing line.

In its brief treatment of the issue, the Joint Opinion refers to the viability line as "seem[ingly] somewhat arbitrary." *Id.* at 27. The Joint Opinion also states that "there is no line other than viability which is *more* work-

¹⁴ In *Roe*, neither party briefed or argued the concept of viability as a logical point at which to find the State's interest in protecting prenatal life "compelling." Appellant specifically disavowed reliance on any point during pregnancy beyond which abortion could be prohibited and relied, instead, on birth as the proper dividing line. *Roe*, at 153. The State argued that its interest was compelling from conception forward, *Roe*, 410 U.S. at 156.

¹⁵ Only two sentences in the Pennsylvania Attorney General's brief of almost 120 pages even refer to viability and these point out that it is an arbitrary concept. Brief for Respondents in *Casey* at p. 111. The Petitioner's brief of 62 pages contains just one paragraph with five sentences. Brief for Petitioner, at pp. 28-29.

able," implying, at least, that viability is not entirely workable. *Id.* at 28 (emphasis supplied). Finally, the Joint Opinion appears to suggest that not all of its authors believe that viability was a justifiable dividing line when *Roe* was decided.

We do not need to say whether each of us, had we been Members of the Court when the valuation of the State's interest [in protecting prenatal life] came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.

Id. at 29.

Given the limited explanation which has been provided to date by the Court in justification of the viability concept, and the centrality of that issue to the holding of *Roe*, the Court should grant this Petition. This would allow the validity of viability as a principled line of demarcation to be carefully examined with the benefit of briefing and argument by both parties to this dispute.

B. Neither of the Reasons, Given in *Casey*, for Adhering to the Viability Concept is Sufficient to Justify such Adherence.

In *Casey*, the Joint Opinion provides two reasons for adhering to *Roe*'s selection of viability as the point when the State's interest in protecting prenatal life becomes sufficiently compelling to override the woman's liberty interest. First, the Joint Opinion invokes the principle of *stare decisis*. Since "*Roe* was a reasoned statement, elaborated with great care [, and has] twice [been] reaffirmed in the face of great opposition," Joint Op. at 27-28, citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron Center I*), the Joint Opinion states that *stare decisis* requires that it be followed. The second reason given is "that the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the

independent existence of the second life can in reason and all fairness be the object of a state['s] protection that now overrides the rights of the woman." *Id.* at 28. Neither of these reasons is sufficient to constitute a principled justification for clinging to the viability concept of *Roe*.

1. *Stare decisis*. Whether one examines the concept of viability under the general approach to *stare decisis* or according to the more specific approach set forth in the Joint Opinion, adherence to viability does not appear warranted.

a. *General Approach*. First, it is simply inaccurate to conclude that *Roe*'s viability determination was "elaborated with great care," or that the Court's rationale for choosing viability was twice reaffirmed.¹⁶

The Texas statute at issue in *Roe* did not set viability as the point at which abortions could be prohibited. Nor did Texas argue that its interest in protecting prenatal life was more substantial at viability than it was at conception. Similarly, the Appellants in *Roe* did not argue that the State's interest became compelling at viability. Rather, they argued that the woman's right to abort continued up until birth; only at that point could the State's interest be considered compelling. Thus, neither of the parties in *Roe* appears to have attached any significance to the point of viability. In light of this, the Court's reference to viability as the point at which abortions could be prohibited was unnecessary to a determination of whether Texas could prohibit virtually all abortions as provided by its statute.¹⁷

¹⁶ The majority opinion in *Thornburgh* and *Akron* stated, in conclusory fashion, that they reaffirmed *Roe* on the basis of *stare decisis*. However, neither opinion expressly defends the rationale upon which the choice of viability was made.

¹⁷ It might have been logical to reach this issue if the Court had intended to treat the matter as a facial challenge and enjoin it only in its impermissible applications. However, since the Court enjoined it in its entirety, there appears to have been no need to address this issue in *Roe*. See *Roe*, 410 U.S. at 177-78 (Rehnquist, J., dissenting).

Moreover, *Roe*'s treatment of viability is truncated, at best. After acknowledging that the State has an "important and legitimate interest in protecting the potentiality of human life," *Roe* states that this interest "grows in substantiality as the woman approaches term and, at a point during pregnancy,[] becomes 'compelling.'" *Roe*, 410 U.S. at 162-163. No satisfactory explanation as to *why* this might be so can be found in *Roe*.¹⁸ The full extent of the explanation for choosing viability as the point when the state's interest becomes compelling is contained in three short sentences.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

Roe, 410 U.S. at 163.

Perhaps the most persuasive criticism of the "logical and biological justifications" of *Roe*'s viability concept may be found in Justice O'Connor's dissent in *Akron Center I*:

In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The

¹⁸ Justice Stevens, in *Thornburgh*, attempts to provide some greater explanation by stating that it is "obvious that the State's interest in the protection of an embryo increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778. Justice Stevens' proposal that the State's interest in protecting the unborn's child's life must increase as he or she develops, however, cannot be correct. If it were correct, then the State's interest in protecting the newborn as well as the mentally incompetent and disabled would be less than its interest in protecting competent adults who are arguably better capable of interacting with society, experiencing pleasure and reacting to their surroundings. Such a notion is clearly contrary to existing laws and principles of equality under the law.

difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult questions of when life begins," *id.*, at 159, the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.

Akron, 462 U.S. at 460-461 (emphasis in original).

b. *Specific approach.* Part III of the Joint Opinion sets forth four separate criteria for determining whether the doctrine of *stare decisis* precludes reconsideration of *Roe*. An examination of the viability concept under each of these demonstrates that it need not be adhered to according to *stare decisis* principles.

i. The first of these criteria is "workability." Although the Joint Opinion did not find *Roe* to be "unworkable," neither does it specifically examine the concept of viability under this criterion, nor does it explain how viability is a workable concept. As explained below, viability does not appear to be "workable" either as a legitimate choice for balancing the competing interests of the woman and the state or for purposes of enforcement.

As a practical matter, whether a particular unborn baby is "viable" depends not only on advances in neonatal care, but also on advances in medical technology that enable physicians to assess accurately fetal age, weight, and lung maturity—factors which must be taken into consideration in estimating the baby's chances of survival if removed from the womb. In addition, viability presumably depends on the availability of such technology within a particular community. Finally, it also depends on the skill of those utilizing such techniques. For example, the accuracy of an ultrasound determination of

gestational age may depend on the quality of the machine as well as the skill of the technician. In the final analysis, then, whether a particular baby is "viable" depends on all of these factors and also on the skill of the physician who must use his best medical judgment based upon the available technology and data to *estimate* the baby's chances for survival. Even with due diligence, a significant margin of error can be expected. As the Court noted, in *Webster*, the district court "found that there may be a 4-week error in estimating gestational age." 492 U.S. at 516.

It is clear that the skill of doctors who perform abortions near the time of viability varies considerably and that many children who are aborted survive these procedures. This indicates that a significant number of erroneous judgments are made. An article in the *Philadelphia Inquirer* stated that Dr. Willard Cates, then Chief of Abortion Surveillance for the Center for Disease Control, "estimates that 400-500 abortion live-births occur every year in the United States." *Philadelphia Inquirer*, Aug. 2, 1981 (Magazine) at 14. As the article notes, this "means that these unintended live births are literally an everyday occurrence." *Id.*

Today, there may be fewer live births due to the fact that dilation and evacuation (D&E) is more commonly used up until the 24th week of pregnancy,¹⁹ and even thereafter by some.²⁰ This procedure involves the dismemberment of the unborn child within the womb followed by the removal of the child's body parts. Although a D&E abortion is almost always fatal to the child, a recent report in The New York Times told of a baby, Ana Rosa

¹⁹ One claimed advantage of D&E over instillation methods is that the woman does not have to "experience the expulsion of the fetus, which may or may not have signs of life." *Hern, Abortion Practice* at 133 (1984).

²⁰ In *Planned Parenthood v. Ashcroft*, the Court noted that one doctor "supported the use of D&E on 28-week pregnancies, well into the third trimester." 462 U.S. 476, 483 n.7 (1983).

Rodriguez, who survived an attempted abortion, albeit without one of her arms which was severed during the procedure. *N.Y. Times*, Nov. 26, 1991, at A. 12.

From the foregoing, it is clear that the determination of whether a particular baby is "viable" is, at best, an imprecise medical judgment—one that many would describe as based only on a physician's "educated guess."

Moreover, reliance on viability as the constitutional benchmark for balancing the woman's liberty interest and the State's interest in protecting the baby's life is wholly arbitrary from the perspective of the woman, the child and the State. This is true because the determination of whether a baby is or is not "viable" may differ solely as a result of the skill of the examining physician whom the woman chooses and the technology available in location where the abortion is sought. Thus, the woman's "liberty" interest has no consistent protection.

Also, regardless of these factors, the baby's status remains the same. Therefore, the State's interest in protecting the baby's life remains the same. And, if an erroneous determination is made, the State's and the baby's interests would be violated. Likewise, the woman's liberty interest would appear to be unequally protected. For example, if one woman's physician is more skilled at determining gestational age, she may be prevented from obtaining an abortion. In contrast, another woman whose physician is less skilled may be allowed to have an abortion even though her baby is equally capable of surviving outside the womb. There is no apparent reason why this should be so. Thus, viability appears to be arbitrary and, therefore, unworkable.

Additionally, if *Roe* had simply selected a specific point in pregnancy (e.g., 24 weeks, which corresponded roughly to its choice of viability) after which States could prohibit abortion, its ruling would have been "more workable" for purposes of enforcement. However, as it stands, the Court

has prevented the States from relying on any "bright lines" regarding viability. *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979) (States may not rely on any single factor to determine viability). Thus, they have been deprived from adopting any statutory cutoff for abortion which is subject to meaningful enforcement capability.²¹

ii. "Reliance" is the second criterion set forth in the Joint Opinion for determining whether *stare decisis* requires adherence to the viability standard. The Joint Opinion seems to acknowledge that "reliance" on the right to abortion might be difficult to justify because "reproductive planning could take virtually immediate account of any sudden restoration of State authority to ban abortions." Joint Op. at 14. However, the Court determines that the "reliance" theory does apply to the right to abortion, generally, because abortion is available in cases of contraceptive failure, *id.*, and "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.*

However coherent this reasoning may be with respect to maintaining the availability of early abortions, it cannot apply with equal force to abortions near the point of viability. Certainly women could maintain their economic and social status by obtaining early abortions rather than waiting until late in pregnancy. Thus, it cannot be said that women must "rely" on the availability of late-term

²¹ Prosecutions under this basically standardless definition of viability have proven to be virtually impossible. In order to enforce a prohibition on abortion after viability, the State must generally prove that the abortionist acted in bad faith, not simply negligently, in erroneously determining gestational age. For insight into other prosecutorial problems, see, *Floyd v. Anders*, 440 F. Supp. 535, 537 (D. S.C. 1977), vacated and remanded, 440 U.S. 445 (1979) (state prosecuting attorney was enjoined from attempting to prosecute a physician for performing an abortion on a woman who was 25 weeks pregnant where baby survived for 20 days and abortion was sought because the pregnant woman "wished an abortion because her expectancy interfered with her hopes and plans to go to college.")

abortions in order to "control their reproductive lives." Indeed, even if this could be argued, it would not seem logical to suggest that such reliance is more significant just prior to viability than just after viability. Therefore, a "reliance" interest in the context of a "viability" argument seems irrelevant.

iii. Application of the third criterion of the Joint Opinion requires that viability be examined according to the "evolution of legal principle." According to this test, if the law upon which *Roe*'s doctrinal footings for choosing viability rests is weaker now than it was in 1973, then *stare decisis* should not preclude abandoning the viability concept. Joint Op. at 14. In *Roe*, the Court rejected the State's claim that its interest in protecting prenatal life was compelling throughout pregnancy. It appears to have done so, in part, based upon its observation that "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. *Roe*, 410 U.S. at 161. Although the *Roe* Court acknowledged that recovery was generally available for prenatal injuries under tort law, it noted that "[i]n most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained." *Id.*

The foregoing statement appears to represent the full extent of the *Roe* Court's legal moorings for selecting viability as the determinative point for allowing States to provide prenatal protection. Whatever logic underlies this notion, it is clear that the legal landscape regarding the protection of unborn children has changed drastically since *Roe* was decided. Judicial and legislative developments in areas of the law (other than abortion) have increasingly recognized that viability is not a relevant criterion in defining public wrongs (criminal law)²² or

²² See e.g., Ill. Rev. Stat. ch. 38, § 9-1.2, 9-2.1, 9-3.2, 12-2.1, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against un-

redressing private injuries (tort law).²³ Thus, this prong of the *stare decisis* test would not support reaffirmation of the viability concept.²⁴

iv. The final criterion for determining whether *stare decisis* counsels reaffirmation of *Roe*, is whether *Roe's* factual assumptions are unsound. Joint Op. at 17. To the extent that *Roe* appears to have relied on any facts to support its choice of viability, it would seem that the Court relied upon the following "facts."

First, the Court appears to have determined that the State's interest which was really at issue was an interest in protecting "potential life," not an interest in protecting "actual life." *Roe*, 410 U.S. at 150-152. Second, although *Roe* claims not to have decided the "difficult question of when life begins," the Court's first reference to viability is in a discussion of the various views on when life does begin. *Id* at 160-161. It is here that the Court notes that the common law seems to have placed the beginning of life at quickening, but then states:

born child, regardless of gestational development); Minn. Stat. §§ 609.2661(1), 609.2662(1) 1988 (same); N.D. Cent. Code § 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991) (same); Challenges to such statutes uniformly have been rejected. *See, e.g., People v. Ford*, 221 Ill. App. 3d 354, 581 N.E.2d 1189 (1991); *Brinkley v. State*, 253 Ga. 541, 322 S.E.2d 49 (1984); *Smith v. Newsome*, 825 F.2d 1386 (11th Cir. 1987); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990).

²³ *See e.g., Pressley v. Newport Hosp.*, 117 R.I. 177, 188, 365 A.2d 748, 753-54 (1976) (rejecting viability test in allowing recovery for stillborn infants under state wrongful death statute); Ill. Rev. Stat. ch. 70, § 2.2 (recognizing cause of action for wrongful death regardless of when injuries inflicted or when death occurs).

²⁴ It is noteworthy that in evaluating *Roe* under this criterion, the authors of the Joint Opinion appear to concede that this prong of *stare decisis* does not support reaffirmation of the viability concept for they state: "Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty." Joint Op. at 16.

[P]hysicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.

Id at 160. Thus in settling upon viability as the significant point at which the State's interest in protecting prenatal life becomes compelling, the Court appears to have found as "fact" that "life" does not begin until viability. That some in the medical community at the time of *Roe* treated the unborn child as a mere appendage of the mother and not as a separate patient seems to have informed the Court's thinking on this point.

However, neither of these "facts" upon which *Roe's* reliance on viability depends is true today. First of all, it is clear that modern prohibitions are founded, not on an interest in protecting *potential* life, but rather on an interest in protecting the *actual* life of the unborn child. *See, e.g.*, Pa. and Guam legislative findings. Pa. Cons. Stat. Ann. sec. 3202(a) (Purdon 1991); P.L. 20-134, sec. 1.

Moreover, whatever can be said of the medical community's treatment of the unborn child at the time of *Roe*, it is clear that modern obstetrical medicine recognizes the unborn child as a second patient throughout pregnancy; not as a mere appendage of the mother. For example, the most current edition of *Williams Obstetrics*, a leading obstetrical text, states:

Obstetrics is an unusual specialty of medicine. Practitioners of this art and science must be concerned simultaneously with the lives and well-being of two persons; indeed, the lives of two who are interwoven.

Cunningham, MacDonald & Gant, *Williams Obstetrics*, vii (18th ed. 1989) (emphasis added). In a chapter entitled "Techniques to Evaluate Fetal Health, it continues:

Until relatively recently, the intrauterine sanctuary of the fetus was held to be inviolate. The mother was

the patient to be cared for; the fetus was but another albeit transient, maternal organ . . . Indeed, the fetus is no longer regarded as a maternal appendage ultimately to be shed at the whim of biological forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother.

Id. at 277.

Finally, with respect to *Roe's* apparent mistaken notion that the unborn child is not alive prior to viability, it can only too readily be proven by modern medical technology that the unborn child is alive and kicking before viability, as well as after viability.

Although the fetus starts making spontaneous movements at about seven weeks after conception, mothers do not usually feel their babies moving until about 16 to 21 weeks. The types of movements the fetus makes include slow squirming movements, sharp kicks, and small rhythmic kicks. The squirming tends to increase during pregnancy, while the rhythmic kicks continue at a constant rate from the fifth to ninth month. The sharp kicks increase up to the seventh month and then diminish.

Valman & Pearson, *What the Fetus Feels*, 1980 Brit. Med. J. 233, 234; *see also*, Affidavit of Douglas Eaton, M.D. (filed in the District Court in this matter) containing detailed description of fetal development including heartbeat, brain waves, etc.

From the foregoing discussion, it is clear that significant arguments can be made to demonstrate that adherence to *Roe's* viability concept should not be based on *stare decisis*.

2. Reason and Fairness. The Joint Opinion notes that at viability, there is a realistic possibility that the unborn child can survive if removed from the womb. It then suggests that due to "the independent existence of the second life" at viability, "reason and all fairness" support

recognition of the State's interest in protecting prenatal life at this stage in pregnancy. Joint Op. at 28. Neither "reason" nor "fairness," however, supports the destruction of unborn children up until the time when they are adjudged to be "viable," but not thereafter.

First, the concept of viability appears entirely irrelevant in the context of abortion. The child's capacity to survive outside the womb is undoubtedly relevant when one is contemplating *removing* the child from the womb and one is concerned about the safety of the child if this is done. That capacity seems entirely irrelevant, however, when the point of viability marks only the time at which the child can no longer be removed from the womb. Second, when viability is reached, the baby presumably will not have "independent existence" because the abortion cannot take place. Thus, the viable unborn child is as physically dependent upon her mother for the same nourishment as is the unborn child who is not yet viable. Accordingly, adherence to viability is not supported by "reason."

Moreover, the viability concept does not appear to be at all "fair" to the many children who are killed through abortion. Nor is it "fair" to those children who survive abortion but are damaged by the procedure—either by having their limbs severed or by being blinded by the caustic solutions which are intended to cause their death but fall short of doing so.

Presumably these children, once aborted would be considered "persons" who are entitled to protection from further abuse. But why they were not considered sufficiently worthy of protection when their injuries were inflicted upon them is beyond all reason.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit be granted, so that the important federal questions raised herein may be resolved.

Respectfully submitted,

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APPENDICES

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 90-16706

D.C. No. CV-90-00013-ARM

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS;
GUAM NURSES ASSOCIATION; THE REVEREND MILTON
H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY,
M.D.; WILLIAM S. FREEMAN, M.D.; JOHN DUNLOP,
M.D.; on behalf of themselves and all others similarly
situated, and all their women patients,

Plaintiffs-Appellees,

v.

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Guam
Alex R. Munson, Chief Justice, Presiding

Argued and Submitted
November 4, 1991—Honolulu, Hawaii

Filed April 16, 1992
Amended June 8, 1992

ORDER AND AMENDED OPINION

Before: Herbert Y. C. Choy, Dorothy W. Nelson and William C. Canby, Circuit Judges.

Opinion by Judge Canby

Paul B. Linton, Americans United for Life, Chicago, Illinois; Arnold H. Leibowitz, Cameron & Hornbostel, Washington, D.C., for the defendant-appellant.

Anita P. Arriola, Arriola, Cowan & Bordallo, Agana, Guam, for the plaintiffs-appellees.

ORDER

It is ordered amending the caption of the opinion filed April 16, 1992, to read as set forth above.

OPINION

CANBY, Circuit Judge:

On March 19, 1990, the Territory of Guam enacted a statute ("the Act") outlawing almost all abortions.¹ The

¹ The final version of Guam Public Law 20-134 states:

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

only exceptions were abortions in cases of ectopic pregnancy, and abortions in cases where two physicians practicing independently reasonably determined that the

§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam.

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action.

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

§ 31.22. Soliciting and taking drugs or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an

pregnancy would endanger the life of the mother or "gravely impair" her health. All other abortions were declared to be crimes, both on the part of the women submitting to the abortions and on the part of the persons procuring or causing them.

The validity of the Act was immediately challenged in this class action brought by the Guam Society of Obstetricians & Gynecologists and others against Joseph F. Ada, the Governor of Guam. The district court accurately viewed the Act as a direct challenge to the regime of *Roe v. Wade*, 410 U.S. 113 (1973), in the Territory of Guam. The district court held that *Roe v. Wade* ap-

abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum, (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

"Shall that public law deprived from Bill 848, Twentieth Guam Legislature (P.L. 20-[134]), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?["]

In the event a majority of those voting "Yes," such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

plied, and granted summary judgment for the plaintiffs, permanently enjoining enforcement of the Act.² We affirm.

I

The plaintiffs in this case are the Guam Society of Obstetricians & Gynecologists; the Guam Nurses Association; physicians Edmund A. Griley, William S. Freeman, and John Dunlop; the Reverend Milton H. Cole, Jr.; and Laurie Konwith. The health care providers in this group clearly have standing to bring this action. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Abele v. Markle*, 452 F.2d 1121, 1125 (2d. Cir. 1971). Because some of the plaintiffs have standing, it is not necessary to determine whether the others do. See *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973); see also *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir.), cert. denied, 474 U.S. 826 (1985).

The district court held that the plaintiff could maintain their action under 42 U.S.C. § 1983, and awarded them relief under the due process guarantees recognized in *Roe v. Wade*. The court determined that those guarantees applied in Guam, under the provisions of the Mink Amendment to the Guam Organic Act, 48 U.S.C. § 1421b(u). The Territory of Guam in the person of Governor Ada ("Guam") challenges all of these rulings on appeal, and urges as well that the authority of *Roe v. Wade* has been undermined by later decisions of the Supreme Court. Before we address these points, however, we must deal with a threshold issue raised by the plaintiffs.

A. Severability of the Unappealed Sections

The district court held that Sections 4 and 5 of the Act violated the First Amendment, and Guam did not appeal

² The district court also held that Section 4 and 5 of the statute, which make criminal the "soliciting" of abortions, violated the First Amendment. That ruling has not been appealed.

from that ruling. The plaintiffs now argue that these sections are not severable from the remainder of the Act. The result, they contend, is that the entire Act has been invalidated, in effect, by the district court's unappealed ruling, leaving nothing to be decided on this appeal. We reject this contention because we conclude that Sections 4 and 5 are severable from the other parts of the Act.

The standard for determining the severability of an unconstitutional provision is well established; "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations omitted). The sections of the Act that remain if Sections 4 and 5 are severed clearly are fully operative as a law. Unless there is evidence of contrary legislative intent, the remainder of the Act should therefore survive the invalidation of Sections 4 and 5.

The plaintiffs put forward two related arguments suggesting a legislative intent against severability. First, they contend that Section 7, which provides for a referendum to determine whether the entire Act should be repealed,³ demonstrates that the Guam Legislature intended the Act to stand or fall as a whole. Second, they argue that the Legislature's intention was to pass a comprehensive antiabortion statute, and that removal of Sections 4 and 5 creates a weaker and less comprehensive statute.

With respect to the first argument, the fact that there was to be a referendum on the entire Act reveals very little about legislative intent regarding severability. The plaintiffs place undeserved emphasis on the words "in its entirety." That part of the section provides that, if a

³ The provision for a referendum did not delay the effective date of the Act. There is accordingly no issue of ripeness.

majority of the voters vote to repeal the law, "such public law shall be repealed in its entirety." An entire repeal is the obvious and logical result of a vote to repeal in a referendum; the words in question signify no more than that.

While the plaintiffs' second argument is not wholly implausible, they present no evidence to support it. The mere suggestion that legislators wanted a comprehensive Act is not sufficient to overcome the presumption of severability that is implicit in the *Alaska Airlines* standard. We therefore reject the plaintiffs' severability arguments, and proceed to the arguments that Guam raises on appeal.

B. *Applicability of Roe v. Wade to Guam*

Guam contends that the substantive due process guarantee enforced in *Roe v. Wade* and subsequent abortion cases does not apply to Guam because nothing in Guam's Organic Act, codified at 48 U.S.C. §§ 1421-1428 (1988), so provides. The plain language of the 1968 Mink Amendment to the Organic Act, codified at 48 U.S.C. § 1421b(u) (1988), belies their claim. The Mink Amendment states that:

The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam . . . and shall have the *same force and effect there as in the United States or in any State of the United States*: . . . the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

48 U.S.C. § 1421b(u) (emphasis added). The Mink Amendment thus expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which

the holding of *Roe* was founded.⁴ See *Roe v. Wade*, 410 U.S. at 153.

It may be true, as Guam argues, that the Supreme Court requires a clear indication of congressional intent before interpreting a congressional action as extending a right to the people of Guam. See *Guam v. Olsen*, 431 U.S. 195 (1977). We can scarcely imagine, however, any clearer indication of intent than the language of the Mink Amendment: the relevant constitutional amendments "have the same force and effect" in Guam as in a state of the United States. There is no need, therefore, to go further. See *Ngiraingas v. Sanchez*, 495 U.S. 182, 186-87 (1990) (resorting to legislative history only after determining that the statutory language was unclear). Accordingly, we hold that *Roe v. Wade* applies to Guam as it applies to the states.⁵

C. Prospective Relief Under 42 U.S.C. § 1983

Guam next argues that the plaintiffs cannot maintain this action against Governor Ada under 42 U.S.C. § 1983 because he is not a "person" within the meaning of that statute. We hold that he is a "person" when sued in his official capacity for prospective relief.

⁴ The Mink Amendment also extends to Guam every other conceivable constitutional source of the right of privacy. See *Roe*, 410 U.S. at 152 (sources relied on by the Court or individual Justices have included the First Amendment, the Fourth and Fifth Amendments, the penumbra of the Bill of Rights, the Ninth Amendment, and the Fourteenth Amendment).

⁵ Our disposition of this question on the basis of the Mink Amendment makes it unnecessary for us to address the further contention of the plaintiffs that the right of privacy-autonomy protected by *Roe v. Wade* qualifies as a "fundamental" constitutional right applicable to an unincorporated territory by its own force. See, e.g., *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (only "fundamental" constitutional rights apply in unincorporated territory).

Section 1983 creates liability for "persons" who, while acting "under color" of state or territorial law, deprive citizens or other persons of rights, privileges, or immunities secured by the Constitution or federal law. 42 U.S.C. § 1983. In *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), an action for damages, the Supreme Court held that territories are not "persons" within the meaning of § 1983. The Court also stated: "[p]etitioners concede, . . . and we agree, that if Guam is not a person, neither are its officers acting in their official capacity." *Id.* at 192. Guam seizes upon this language. It contends that, because Governor Ada is being sued to prevent him from enforcing a statute of Guam, he is necessarily being sued in his official capacity. Therefore, Guam asserts, he cannot be considered a "person" subject to suit under section 1983.

Guam's argument overlooks the distinction between suits against governmental officials for damages, such as *Ngiraingas*, and those for injunctive relief. The distinction has been spelled out in cases involving state officials. Like territories, states are not "persons" for purposes of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-65 (1989). In addition, state officers, when sued for damages in their official capacities, are likewise not "persons" within the meaning of 1983. *Id.* at 71. Any other conclusion would render meaningless the ruling that states are not "persons"; a judgment against a state official in his or her official capacity runs against the state and its treasury. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The rule is entirely different, however, when the suit is for injunctive relief. "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. at 167 n.14); see *Ex parte*

Young, 209 U.S. 123, 159-60 (1908). We can see no reason why the same distinction between injunctive and damages actions against officials should not apply to a territory.

Guam attempts to distinguish *Will* by arguing that Guam is a "federal instrumentality" rather than a sovereign entity like a state. Because Congress maintains control over the Territory, Guam contends that there is no need to apply § 1983 to Guam or its officials.

Guam's argument proves too much. Under its approach, section 1983 would not apply at all in any territory—not even to municipalities or officials acting in their individual capacities. Such a result would totally nullify the provision of section 1983 imposing liability upon persons acting under color of law of "any State or Territory." Accordingly, we conclude that Governor Ada, when sued as he is here in his official capacity for injunctive relief, is a person within the meaning of 42 U.S.C. § 1983.

II

Having determined that the plaintiffs may maintain this action under section 1983, we turn to the substantive due process claim. Two issues arise: (1) whether Guam's Act violates the right of privacy protected by *Roe v. Wade*, and (2) whether subsequent Supreme Court decisions, particularly *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), have so eroded *Roe v. Wade* that *Roe* cannot now be applied to invalidate Guam's Act.

A. Validity of the Act under *Roe v. Wade*

The first issue is not hard to resolve. Guam's Act makes no attempt to comply with *Roe*. In *Roe*, the Supreme Court recognized that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that for the

state to deny this choice "may force upon the woman a distressful life and future," along with other harms. *Roe*, 410 U.S. at 153. The Court further recognized that limitation of the woman's fundamental right of choice could be justified only by a "compelling state interest." *Id.* at 155.

The Court in *Roe* rejected the state's argument, renewed by Guam here, that the state has a compelling interest in protecting fetal life from the moment of conception. *Id.* at 159. Thus *Roe* recognized the superior right of choice by the woman during the first trimester of pregnancy, and her right during the second trimester limited only by the state's compelling interest in protecting her health. *Id.* at 163. Only after the point of viability did the state's interest in fetal life become compelling and permit the state to proscribe abortion entirely. *Id.* at 163-64.

The Guam Act gives not a nod toward *Roe*. With two narrow exceptions, it simply negates the rights and interests of the pregnant woman and forbids her to terminate her pregnancy from the moment of conception. It is difficult to imagine a more direct violation of *Roe*. Even the exceptions for abortion to save the mother's life or to prevent grave impairment to her health are hedged with crippling restrictions. The pivotal determination must be made by two physicians "who practice independently of each other"; they must make their determination "using all available means," and subject to subsequent review by a peer review committee. Act, 9 Guam Code Ann. § 31.20. Less cumbersome two-physician and peer review requirements were struck down by the Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973), decided with *Roe*, and in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-71 (1986).

If the core of *Roe* remains good law, then, the Act is clearly unconstitutional. Guam contends, however, that subsequent decisions have so eroded the analysis of *Roe*

that Guam's Act should be held to be constitutional under the current state of the law. We now address that contention.

B. The Status and Applicability of Roe Today

Guam contends that *Roe* has no force after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Putting *Webster* together with non-majority opinions in other cases, Guam contends that the classification of competing interests has changed. Guam relies particularly upon Justice O'Connor's dissents in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814, and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983). According to Guam, five Justices of the Supreme Court now recognize the state's compelling interest in potential human life throughout pregnancy, and no longer adhere to the *Roe* analysis. In *Webster*, a three-Justice plurality stated that it did "not see why the State's interest in protecting potential human life should come into existence only at the point of viability." *Webster*, 492 U.S. at 519. It also characterized the woman's interest as a "liberty interest," as distinguished from a "fundamental right." *Id.* at 520. Guam would put these statements together with Justice Scalia's view that *Roe* should be overruled. *Id.* at 532. It would then add Justice O'Connor's view that regulations that do not impose an "undue burden" on a woman's right to seek an abortion are sustainable if rationally related to a legitimate state purpose. *Id.* at 529-30; *Thornburgh*, 476 U.S. at 828.⁶ Finally, it would include Justice

⁶ Guam also contends that *Roe*'s requirement of a "compelling interest" on the part of the state was reduced to that of a "rational basis" in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (*Akron II*), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). *Akron II* and *Hodgson* dealt with minor women, however, and the Court has recognized that "the State has somewhat broader authority to regulate the activities of children than of adults." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

O'Connor's position elsewhere expressed that the state's compelling interest exists throughout pregnancy. *See Akron*, 462 U.S. at 459; *Thornburgh*, 476 U.S. at 828. From this mix, Guam derives the conclusion that its interest in fetal life can overcome the woman's right to choose whether to have an abortion, and that Guam's Act is therefore not unconstitutional on its face.

We reject Guam's construct. The bits and pieces assembled by Guam fall short of compelling us to do that which the Supreme Court itself has declined to do—overrule *Roe v. Wade*. In *Webster*, the Court modified *Roe* only to the extent necessary to uphold Missouri's requirement of testing for viability. *Webster*, 492 U.S. at 521. The plurality opinion stated that the case afforded no occasion to revisit *Roe*, "and we leave it undisturbed." *Id.* Justice O'Connor found no conflict between Missouri's statute and *Roe*, and similarly concluded that there was no need to reexamine *Roe*. *Id.* at 525-26. Three dissenters opined that *Roe* survived *Webster*, although it was not secure. *Id.* at 537 (dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall). Justice Scalia in his concurrence chastised the Court for failing to overrule *Roe*. *Id.* at 532. In the face of these pronouncements, it would be both wrong and presumptuous of us now to declare that *Roe v. Wade* is dead.⁷

We also have severe difficulty accepting the conclusions that Guam draws from the existing mosaic of decisions. In the first place, it is hard to see how Justice O'Connor's view helps Guam: surely an outright criminalization of abortion places an "undue burden" on the exercise of the

⁷ In its most recent abortion-related case, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Supreme Court upheld certain federal regulations against a challenge that they violated a woman's due process right to choose whether to terminate her pregnancy. The Court held that the regulations dealing with activities of federally-funded programs did not violate *Roe v. Wade*, *Id.* at 1777. It did not suggest that *Roe v. Wade* was no longer the law.

woman's right.⁸ Second, a view of the state's interest in potential life as "compelling" throughout pregnancy does not necessarily mean that it sweeps all other interests out of the way.⁹ There is a countervailing right in issue here, although we find little reflection of it in Guam's briefs. No matter how it is characterized, the right of a woman not to be forced to endure a pregnancy and birth is an extremely important one. Pregnancy entails "profound physical, emotional, and psychological consequences." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981). "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy." *Thornburgh*, 476 U.S. at 772. The individual's interest in exercising control over intimate personal decisions has been recognized in decades of Court precedent. *See id.*; *Akron*, 462 U.S. at 419; *Roe*, 410 U.S. at 167-70 (Stewart, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). We would not lightly conclude that it could be overcome wholesale at any stage of pregnancy by Guam's interest in potential life.

The balancing of these vital individual interests against the state's interest in potential life is not an exercise in

⁸ Because Justice O'Connor's "undue burden" test is of no assistance to Guam, we need not decide what authoritative effect, if any, it must be given. *See Planned Parenthood v. Casey*, 947 F.2d 682, 687-98 (3d Cir. 1991) (Justice O'Connor's standard is now the law of the land, *cert. granted*, 112 S. Ct. 931 (1992)).

⁹ There clearly must be limits to the ability of a state's interest in potential life, whether or not characterized as compelling, to override all conflicting interests. Potential human life exists in the ovum and sperm. *See Webster*, 492 U.S. at 565-66 (Stevens, J., concurring in part and dissenting in part). A state could maximize that potential by forbidding contraception, or even by requiring regular sexual intercourse by all fertile persons. The prospect is absurd, of course, because there are highly important constitutional rights that would be interfered with by such a measure.

mathematics. These forces present a constitutional clash of the first order. Its outcome cannot be predetermined by adopting in the abstract various assembled characterizations of the interests at stake or formulae for weighing them. A more fundamental process is at work. *Roe* worked through that process and came to a result that has affected the lives and rights of millions of people. It is not for this court to discard that precedent.¹⁰

III

The judgment of the district court permanently enjoining the enforcement of Guam's Public Law 20-134 is

AFFIRMED.¹¹

¹⁰ We find it unnecessary to address the plaintiffs' arguments that Guam's Act is void for vagueness and overbreadth. We also decline to address the plaintiffs' arguments based on the Establishment Clause, the Equal Protection and Due Process Clauses, the Eighth and Thirteenth Amendments, and comparable provisions of the Guam Bill of Rights, 48 U.S.C. § 1421b.

¹¹ The plaintiffs have requested attorneys' fees in connection with this appeal. They will be entitled to them if they ultimately prevail in this proceeding. 42 U.S.C. § 1988; *see Hutto v. Finney*, 437 U.S. 678, 692 (1978). If the plaintiffs apply for fees in this court, we will transfer their application to the district court for a determination of the recoverable amount. In those proceedings, Guam will have the opportunity to contest the standing of the plaintiffs who are not health care providers, to the extent that that issue has any effect on recoverable fees.

Fees at the trial level were granted in a separate proceeding, separately appealable.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
TERRITORY OF GUAM

Civil Case No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS;
GUAM NURSES ASSOCIATION; THE REVEREND MILTON H.
COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.;
JOHN DUNLOP, M.D., on behalf of themselves and all
others similarly situated, and all their women patients,*
Plaintiffs,

v.

JOSEPH F. ADA, in his individual and official capacities;
DR. LETICIA ESPALDON; GEORGE B. PALICAN; ELIZA-
BETH BARRETT-ANDERSON; GLORIA B. NELSON, THOMAS
J.B. CALVO, FLORENCIO T. RAMIREZ, LEONILA L.G. HER-
RERO and MICHAEL PHILLIPS, as the Board of Directors
of the Guam Election Commission, in their official ca-
pacities, together with all others similarly situated,
Defendants

DECISION AND ORDER RE PERMANENT
INJUNCTION AND OTHER MOTIONS

[Filed Aug. 23, 1990]

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* Original lead plaintiff Maria Doe was dismissed as a party
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THIS MATTER came before the Court on August 7, 1990, for hearing of the following motions: Plaintiffs' motion for summary judgment and permanent injunction; plaintiffs' motion for summary judgment based on 42 U.S.C. § 1983; defendant Governor Ada's motion to dismiss; defendant Governor Ada's motion for partial summary judgment; and, defendant Attorney General Barrett-Anderson's motion to dismiss.

THE COURT, having reviewed the voluminous filings and having fully considered the arguments made by the parties in their respective memoranda of law and at oral argument, finds that there are no genuine issues of material fact which would preclude summary judgment and that such disposition is, therefore, appropriate.

Statement of Undisputed Facts

On July 10, 1989, Senator Elizabeth P. Arriola introduced Bill 848 before the Guam Legislature. Bill 848 provided as follows:

AN ACT TO REPEAL AND REENACT § 31.20 OF TITLE 9, GUAM CODE ANNOTATED, TO REPEAL §§ 31.21 AND 31.22 THEREOF, TO ADD 31.23 THERETO, TO REPEAL SUBSECTION 14 OF SECTION 3107 OF TITLE 10, GUAM CODE ANNOTATED, RELATIVE TO ABORTIONS, AND TO CONDUCT A REFERENDUM THEREON.

BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

“§ 31.20. Abortion: defined. “Abortion” means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. “Abortion” does not mean the medical intervention in (i) ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother any such termination of pregnancy to be subsequently reviewed by a peer

review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam.”

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

“§ 31.21. Providing or administering drug or employing means to cause an abortion. Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to cause an abortion of such woman as defined in § 31.20 of this Title is guilty of a third degree felony. In addition, if such person is a licensed physician, the Guam Medical Licensure Board shall take appropriate disciplinary action.”

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

“31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.”

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

“§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor.”

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted to an island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro: "Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-134), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?"

In the event a majority of those voting vote "Yes," such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

During later discussion of the Bill, the Senator justified the near-complete ban on abortions on Guam on the ground that

Guam is a Christian community. That no matter which way you're going to say "this is not religion, this is not so and so," I beg to differ, Mr. Speaker. It's a Christian community. We decide what we're going to have here on Guam.¹

Transcript of Legislative Session, March 8, 1990.

Senator Arriola's legal counsel had advised her that the Bill as introduced would probably be struck down because "[j]udges are bound by Supreme Court decisions

¹ This passage calls to mind the 1856 admonition of Chief Justice Black of the Commonwealth of Pennsylvania, as quoted by Justice

because [the decisions are] binding precedent, and that more than likely a judge would probably find that this bill was not in keeping with *Roe v. Wade*." Deposition of Attorney June Mair, May 10, 1990, at p.23.

On September 16, 1989, the Guam Legislature's Committees on Health, Welfare and Ecology and the Judiciary and Criminal Justice held a joint hearing on two abortion bills, Senator Arriola's and another introduced by two other senators. The latter bill would have allowed abortions under somewhat broader circumstances. Of the people who testified at the hearing, the "overwhelming majority . . . supported the bill on grounds of expressed religious belief or orientation." Committee Report on Bill 848, at pp. 3-4.

On February 26, 1990, Guam's Attorney General, Elizabeth Barrett-Anderson, filed twelve pages of written testimony with the Committee on Judiciary and Criminal Justice. The Attorney General gave as the legal opinion of her office that both bills were "violative of a woman's constitutional right of privacy as enunciated by the United States Supreme Court in *Roe v. Wade*." The Attorney General noted that a "state cannot interfere with a woman's right of personal privacy to decide to have an

Brennan in *School District of Abington Township (Pa.) v. Schempp*, 374 U.S. 203, 304, 83 S.Ct. 1560, 1614-1615 (1963):

The manifest object of the men who framed the institutions of this country was to have a *State without religion*, and a *Church without polities*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. "Essay of Religious Liberty," in Black, ed., *Essays and Speeches of Jeremiah S. Black* (1886), 53. (Emphasis in the original)

Schempp is a noteworthy primer on First Amendment religious freedom.

abortion whatever the cause of her pregnancy. The state may *regulate* such a decision, but it cannot deprive a woman of such a choice." (Emphasis in original) Because both bills effectively proscribed abortion, the Attorney General gave as her legal opinion that "both bills would be held unconstitutional." Attorney General's Opinion, pp. 1-4.

After minor amendments, including the addition of a legislative "finding" that "life begins at conception," the Legislature unanimously passed the Bill 848 on March 8, 1990.

On March 19, 1990, defendant Governor Joseph F. Ada signed the bill into law as Public Law 20-134. In his March 23, 1990, transmittal letter to the Speaker, Governor Ada noted that his "pro-life" stance was well-known, but that Bill 848 was "even more severe than my views on the subject are." Despite his expressed misgivings about almost every substantive part of the bill, and after, in his own words, prayer and much soul-searching, the Governor

came to the realization that in terms of my personal beliefs and my personal actions, the question for me really boils down to one simple point. Do I consider a foetus a human being? In my heart, I believe a foetus is a human being. And having such belief, how could I accord a foetus any less respect or dignity than I would any other human being? Having come to this conclusion, my choice is fairly simple. Do I act in accordance with my firmly held personal beliefs, or do I not?

* * * *

Believing as I do, I personally can see no honorable course for me to take, no action that I could take and still be true to my conscience other than signing this bill. This is a personal decision, and one that I must make if I am to be true to my own beliefs.

The law took effect immediately and abortions were effectively banned in the Territory of Guam.

On March 20, 1990, Janet Benshoof, in a luncheon speech before the Guam Press Club, after acknowledging that Guam's new law prohibited the "soliciting" of abortions, "informed" the audience that abortions could be obtained in Hawaii and gave a telephone number in that state for further information. She was promptly arrested under the solicitation provisions of the new law. (These charges subsequently were dismissed, but without prejudice.)

On March 23, 1990, plaintiffs filed this lawsuit, challenging the constitutionality of the Act. Plaintiffs alleged that the law violates the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. The Court issued a temporary restraining order the same day. After a hearing on March 26, 1990, the temporary restraining order was continued in force until further order of the Court.

Decision

Summary Judgment and Permanent Injunction

After the emotionalism and stridency of the opposing views are stripped away, the strict legal issue before the Court is not one difficult of resolution: Is *Roe v. Wade*² the law in the Territory of Guam? Because the Court finds that it is, plaintiffs' motion for summary judgment is GRANTED and, for the reasons stated hereinbelow, defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon³ are permanently

² 410 U.S. 155, 93 S.Ct. 705, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1409 (1973).

³ Dr. Leticia Espaldon is the Director of the Department of Public Health and Social Services for the Territory of Guam.

Defendant George B. Palican is the Administrator of Guam Memorial Hospital. By stipulation filed June 25, 1990, he agreed

enjoined from enforcing any of the provisions of Public Law 20-134.

In 1968, the United States Congress amended the Organic Act of Guam.⁴ Among the 1968 changes was one amending Guam's Bill of Rights to add an entire section:

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; *the second sentence of section 1 of the fourteenth amendment*⁵; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency. (Emphasis added)

48 U.S.C. § 1421b(u).

Governor Ada insists that § 1421b(u) does not mean what it says. His position of record, in his memoranda

"to abide by all injunctions and court orders and . . . be bound by the final judgment or decree in this action." The Election Commission entered into a like stipulation.

⁴ Title 48 U.S.C. § 1421, *et seq.* The amendments were contained in the Guam Elective Governor Act, Pub.L. 90-497, § 10, 82 Stat. 842 (1968).

⁵ The second sentence of section 1 of the Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and at oral argument, is that post-1968 United States Supreme Court decisions in the area of substantive due process rights and equal protection have no force and effect in the Territory of Guam. This unusual proposition is based upon his belief that since the United States Congress, when it amended the Organic Act in 1968, could not have foreseen the 1973 Supreme Court decision in *Roe v. Wade*, Congress could not have intended it to apply to the Territory of Guam. To quote from defendant Governor's memorandum of July 13, 1990:

Under Ngiraingas v. Sanchez, [110 S.Ct. 1737 (1990)], in determining whether Congress extended the privacy/abortion right under the First, Third, Fourth, Fifth, Ninth or Fourteenth Amendments, this court must seek indicia of congressional intent at the time 48 U.S.C. Section 1421b(u) was enacted in 1968. There is, however, no clear signal given from the legislative history of Section 1421b (u) that Congress intended to extend the privacy/abortion right to Guam. As a matter of law, therefore, the First, Third, Fourth, Fifth and Ninth and Fourteenth Amendments, to the extent that they encompass a privacy/abortion right, do not have the same effect and application that they have in the states. *Roe v. Wade* . . . does not apply to Guam and Guam may regulate abortion as in Public Law 20-134.

According to Governor Ada, Guam was "frozen in time" in 1968 unless it can be shown that Congress gave a "clear signal" that post-1968 Supreme Court decisions involving any of the rights § 1421b(u) were to have force and effect in the Territory. He sees no such "signal."⁶

⁶ This appears to be the first time since 1968 that Guam's government has forwarded this interpretation of subsection (u). None of the defendants supplied the Court with any case citations in support of this singular reading of the Organic Act.

Governor Ada's precise argument finds no known precedent in American jurisprudential history. His reliance on *Ngiraingas* to support the "frozen in time" theory of the applicability of certain constitutional rights to the Territory of Guam is erroneous. It is sufficient here to note just one flaw in defendant's reasoning. Section 1983 was enacted by Congress more than a century ago in response to the activities of the Ku Klux Klan. It was not unreasonable in *Ngiraingas*, then, for the Supreme Court to look at § 1983's legislative history to determine if a territory such as Guam was intended to fall within its ambit. However, the Organic Act of Guam is a federal statute concerning *only* Guam. When it was amended in 1968, the amendments applied *only* to Guam. It is inconceivable to the Court that Congress would add subsection (u) to § 1421b and yet simultaneously fix it immutably in time in 1968 so that it would not truly "have the same force and effect" as in the United States, as provided.

This Court cannot imagine a clearer "signal" from Congress than that, by enacting subsection (u) in 1968, it felt an obligation to insure that the people of Guam would enjoy more of the constitutional protections afforded other citizens of the United States. Inarguably, it seems to this Court, the express words of the statute demonstrate that Congress intended that the people of the Territory of Guam would from 1968 onward be afforded the full extent of the constitutional protections added to Guam's Bill of Rights, as those rights are found in the United States Constitution and as they are construed and articulated by the United States Supreme Court. It follows, then, when interpreting subsection (u), that since the decisions of the United States Supreme Court, including *Roe v. Wade*, are the law of the land, they apply with equal force and effect to the Territory of Guam. Having determined that *Roe v. Wade* applies in Guam, the Court finds that Public Law 20-134 is unconstitutional. For the reasons given below, the entire law must fall.

This Court need not address the legislative funding of Section 1 that "life begins at conception." It is sufficient to note that Guam cannot "justify" an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodies Guam's view of when life begins.

Next, as the *Roe* Court noted, the United States Supreme Court has recognized since at least 1891 that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The roots of this right of privacy are found in the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, the Ninth Amendment, and the concept of liberty guaranteed by the first section of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. at 152-153. The right of privacy has some extension to marriage, procreation, contraception, family relationships, child rearing and education, and the qualified right to obtain an abortion. *Id.*

However, as *Roe* noted, the right of personal privacy, in the context of a woman's decision regarding abortion, is not unqualified and must be weighed against important state interests in regulation. *Id.*, at 155. Under *Roe*, Guam may regulate abortions only to serve two compelling interests: The government's paramount interest throughout the pregnancy in the woman's health, *Id.* at 154, and the government's interest after viability in protecting the potentiality of human life, *Id.*, at 162. During approximately the first trimester of pregnancy, neither of these interests is deemed "compelling" for purposes of constitutional analysis and the government may not restrict a woman's right to choose an abortion. *Id.*, at 164. During approximately the second trimester, the government may only regulate the abortion procedure in ways that are "reasonably related to maternal health." *Id.* After viability [of the fetus], the government may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate

medical judgment, for the preservation of the life or health of the mother. *Id.*, at 165. Therefore, any law purporting to regulate abortion must take into account these different interests, and protect both the rights of the individual woman and the interests of the state.

Because Sections 2⁷, 3⁸, 4⁹, and 5 (Title 9 G.C.A. §§ 31.20, 31.21, 31.22, and 31.23, respectively) of the

⁷ The "two-physician" and "peer review" provisions fail. *See, Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1410 (1973).

The "two-physician" requirement fails because the "required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on a physician's right to practice." (Emphasis added) *Id.*, at 199. Also, the section contains no emergency exception to the two-physician requirement, as required by the Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 770-771 (1986).

The "peer review committee" fails because it is "unduly restrictive of the patient's rights that . . . have already been medically delineated and substantiated by her personal physician." *Id.*, at 197-198. As well, the additional time necessitated by this procedure may implicate the Supreme Court's decision in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), which invalidated a 24-hour waiting requirement.

Finally, some of the phrases contained in this section—such as "practice independently of each other," "reasonably determine using all available means," "substantial risk," "gravely impair," and "adequately equipped medical clinic"—lacking as they do any precise definition, would undoubtedly raise due process questions since "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

⁸ Section 3 directly contravenes the law as established by *Roe v. Wade*.

⁹ Sections 4 and 5 also violate the First Amendment since they attempt to prohibit freedom of speech. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because

Guam law fail to make distinctions based on the stage of the pregnancy, and because the law does not recognize, as it must, any of the other constitutionally-protected interests involved, it violates the Due Process Clause of the Fourteenth Amendment,¹⁰ as it applies to Guam via § 1421b(u).¹¹

42 U.S.C. § 1983 Claims

Because of the importance of the issue and the seemingly unsettled state of the law as it applies to Guam, the Court believes it is necessary and proper to address plaintiffs' § 1983 claims.

The Supreme Court has held that "neither the Territory of Guam nor its officers acting in their official capacities are 'persons' under § 1983." *Ngiraingas v. Sanchez*, — U.S. —, 110 S.Ct. 1737, 1743 (1990). The Supreme Court has also said, however, that "a state

society finds the idea itself offensive or disagreeable. [Citations omitted]." *Texas v. Johnson*, — U.S. —, 109 S.Ct. 2533, 2544 (1989).

These two sections are constitutionally infirm insofar as they would make criminal any discussion between a woman and her doctor concerning the need for, and access to, an abortion. The state has no compelling interest in intruding in this most private area of consultation between a woman and her physician. *See, e.g., Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990).

These sections are also invalid on their face insofar as they purport to prohibit more general speech concerning abortion and its availability. *See Thornburgh, supra*, 476 U.S. at 760-764; *Akron Center for Reproductive Health, supra*, 462 U.S. at 429-430, 443-445.

¹⁰ To paraphrase *Roe*, "Indeed, it is difficult to imagine a more complete abridgement of a constitutional freedom than that worked by the inflexible criminal statute now in force in [Guam]." *Roe v. Wade*, 410 U.S. at 171.

¹¹ In light of the Court's decision, Section 7 of the Act, providing for a referendum, is rendered moot. The Election Commission was named as a defendant since it would have been charged with responsibility for conducting the referendum. The Commission has remained neutral throughout these proceedings.

official acting in his or her official capacity, when sued for injunctive relief, *would* be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.' (Emphasis added) *Will v. Michigan Dept. of State Police*, — U.S. —, 109 S.Ct. 2304, 2311, N. 10 (1989), quoting, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14 (1985). The theory supporting this view was expressed in *Ex Parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454 (1908):

The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

* * * *

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Plaintiffs thus make two arguments for the continuing vitality and utility of § 1983 in the Territory of Guam. First, they argue that *Ngiraingas* left open the question of the availability under § 1983 of injunctive relief

against the Territory of Guam and its officers acting in their official capacities. Second, they maintain that § 1983 injunctive relief is available against Governor Ada in his *individual* capacity. The Court will consider each claim in turn.¹²

The Supreme Court's decision in *Ngiraingas* did not address, and thus cannot be said to have changed, the rule that prospective injunctive relief is available against an official acting in his or her official capacity. See, *Will* and *Kentucky v. Graham*, *supra*. However, because both the Supreme Court and the Ninth Circuit, in their respective *Ngiraingas* decisions, found on the facts of that case that Guam was not a "person" for purposes of § 1983, neither court confronted the issue of whether Guam, like a state, enjoys sovereign immunity under the Eleventh Amendment or the extent of the immunity afforded by 42 U.S.C. § 1421a¹³. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 2, and 1743, n. 12.

The Court believes that Guam does not on the facts before it enjoy immunity from injunctive relief, whether based on the Eleventh Amendment or § 1421a. "In an injunction grounded on federal law, the State's [Eleventh Amendment] immunity *can* be overcome by naming state officials as defendants." (Emphasis in original) *Kentucky v. Graham*, 473 U.S. at 170, n. 18, citing *Pennhurst State*

¹² The Court is aware, as surely are the parties, that a finding of any relief predicated upon § 1983 will entitle plaintiffs to apply for an award of attorney fees under 42 U.S.C. § 1988. Section 1988 provides in part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

¹³ Section 1421a provides in part that "The government of Guam . . . shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers."

School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984), and *Ex parte Young*, *supra*. Similarly, and relying again on the reasoning of *Ex parte Young* and its progeny the Court finds that § 1983 provides an independent ground to permanently enjoin defendants Governor Ada, Attorney General Barrett-Anderson, and Dr. Espaldon from enforcing any of the provisions of Public Law 20-134.¹⁴

The remaining issue involves § 1983 injunctive relief against Governor Ada in his individual capacity. Plaintiffs argue that such relief is available because the Supreme Court noted without objection that portion of the

¹⁴ The Court does not today, of course, address the issue of attorney fees. The § 1988 provision for an award of attorney fees and costs was enacted to encourage enforcement of civil rights provisions by compensating those who bring meritorious actions. The possibility of an award of fees and costs provides an important inducement for attorneys to undertake the vindication of constitutional rights in unpopular causes. Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray.

Left for future consideration is the effect of the Ninth Circuit's reasoning in its *Ngiraingas* decision that a § 1983-based money judgment against defendants in their official capacities was prohibited because it would have affected the public treasury and, thus, would essentially have been a suit against the Government of Guam itself. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1372 (9th Cir. 1988). Likewise here, even though the granting of injunctive relief does not itself affect the public treasury, a request for, and an award of, attorney fees following the injunction *would* most assuredly affect the public treasury. The Court is cognizant of those cases that treat attorney fees as "ancillary" to the merits of the case and which are deemed, therefore, not to affect the public treasury. See, e.g., *Kentucky v. Graham*, 473 U.S. at 170, n. 18; *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978); *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974); *Maher v. Gagne*, 448 U.S. 122, 131-132, 100 S.Ct. 2570, 2575-2576 (1980) and *Gagne v. Maher*, 594 F.2d 336, 341-342 (2nd Cir. 1979); *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986); and, *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).

Ninth Circuit's *Ngiraingas* opinion which held that the police officers there still could be sued under § 1983 in their individual capacities, to the extent they were not entitled to immunity. *Ngiraingas v. Sanchez*, 110 S.Ct. at 1739, n. 3.

The distinction between personal-capacity liability and official-capacity liability was explained in *Kentucky v. Graham*, 473 U.S. at 166-168, 105 S.Ct. at 3105-3106 (1985):

Personal-capacity suits seeks to impose personal liability upon a government official for actions he takes under color of state law. (Citations omitted)

* * * *

On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. (Citation omitted)

* * * *

When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objective reasonable reliance on existing law. In an official-capacity action, these defenses are unavailable. (Citations omitted) The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

* * * *

With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. (Emphasis in the original)

Graham involved a suit for money damages. Here, in contrast, plaintiffs seek to enjoin Governor Ada, as an *individual*, from enforcing the provisions of Public Law 20-134. The Court does not believe it would be possible for the Governor, acting as a *private individual*, to enforce Public Law 20-134. The Court declines to enjoin Governor Ada, as an individual, under § 1983.

Accordingly, for the reasons given above, summary judgment shall enter that Public Law 20-134 violates the United States Constitution, the Organic Act of Guam, and 42 U.S.C. § 1983. Defendants, their employees, agents, and successors, are permanently enjoined from enforcing and/or executing any portion of Public Law 20-134.

IT IS SO ORDERED.

DATED this 23rd day of August, 1990.

/s/ Alex R. Munson
 ALEX R. MUNSON
 Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE TERRITORY OF GUAM

Civil Action No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND
 GYNECOLOGISTS, *et al.*,

Plaintiffs,

v.

JOSEPH F. ADA, in his individual and
 official capacities, *et al.*,

Defendants.

AMENDED JUDGMENT

[Filed Oct. 16, 1990]

Pursuant to the Order granting plaintiffs' Motion to Alter or Amend Judgment issued today, the judgment previously entered in this matter is hereby amended as follows:

This matter came on for hearing, on August 7, 1990 on plaintiffs' Motion for Summary Judgment re 42 U.S.C. § 1983 and Motion for Summary Judgment and Permanent Injunction pursuant to Rule 56 of the Federal Rules of Civil Procedure; defendant Ada's Motion for Partial Summary Judgment; and defendants Ada's and Barrett-Anderson's Motions to Dismiss. The Court having considered the pleadings in the action, the motions, oppositions and replies, all of the declarations and exhibits on file herein, and having heard oral argument and having found that there is no genuine issue of fact to be sub-

mitted to the trial court, and having concluded that plaintiffs are entitled to judgment as a matter of law, the Court having further concluded that a permanent injunction should issue because plaintiffs will suffer permanent and irreparable injury, loss and damage,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS in their official capacities in accordance with the Decision and Order filed in this matter on August 23, 1990. Defendant Joseph F. Ada cannot be held liable in his individual capacity under 42 U.S.C. § 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that sections two through five of Public Law 20-134 are hereby declared unconstitutional and void under the U.S. Constitution, the Organic Act and 42 U.S.C. § 1983. Consequently, section seven of Public Law 20-134 is hereby rendered moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Joseph F. Ada, Leticia Espaldon, George B. Palican, Elizabeth Barrett-Anderson, Gloria B. Nelson, Thomas J.M. Calvo, Florencio T. Ramirez, Leonila L.G. Herrero and Michael F. Phillips, in their official capacities, their officers, agents, assistants, servants, employees, successors and all persons acting in concert or cooperation with them at their direction or under their control be restrained and enjoined permanently from operating, administering, enforcing or executing all provisions of Public Law 20-134.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Order Granting Ex Parte Motion for Extension of Time to File Application for Attorneys' Fees and Costs, dated September 17, 1990, plaintiffs may file their application for attorneys fees,

costs, and disbursements within thirty (30) days from entry of this Amended Judgment. Defendants shall have thirty (30) days to file a response to plaintiffs' application, and plaintiffs shall have fifteen (15) days to reply to defendants' response.

Dated this 16th day of October, 1990.

/s/ Alex R. Munson
JUDGE ALEX R. MUNSON

APPENDIX D**Public Law 20-134****TWENTIETH GUAM LEGISLATURE
1989 (FIRST) Regular Session**

Bill No. 848 (COR)
Substituted by the author

Introduced by: E. P. Arriola
T. S. Nelson

**AN ACT TO REPEAL AND REENACT
§ 31.20 OF TITLE 9, GUAM CODE ANNO-
TATED, TO REPEAL §§ 31.21 AND 31.22
THEREOF, TO ADD § 31.23 THERETO, TO
REPEAL SUBSECTION 14 OF SECTION
3107 OF TITLE 10, GUAM CODE ANNO-
TATED, RELATIVE TO ABORTIONS, AND
TO CONDUCT A REFERENDUM THEREON.**

**BE IT ENACTED BY THE PEOPLE OF THE TER-
RITORY OF GUAM:**

Section 1. Legislative findings. The Legislature finds that for purposes of this Act [the] life of every human being begins at conception, and that unborn children have protectible interests in life, health, and well-being. The purpose of this Act is to protect the unborn children of Guam. As used in this declaration of findings the term "unborn children" includes any and all unborn offspring of human beings from the moment of conception until birth at every stage of biological development.

Section 2. § 31.20 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"§ 31.20. Abortion: defined. "Abortion" means the purposeful termination of a human pregnancy

after implantation of a fertilized ovum by any person including the pregnant woman herself with an intention other than to produce a live birth or to remove a dead unborn fetus. "Abortion" does not mean the medical intervention in (i) an ectopic pregnancy, or (ii) in a pregnancy at any time after the commencement of pregnancy if two (2) physicians who practice independently of each other reasonably determine using all available means that there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother, any such termination of pregnancy to be subsequently reviewed by a peer review committee designated by the Guam Medical Licensure Board, and in either case such an operation is performed by a physician licensed to practice medicine in Guam or by a physician practicing medicine in the employ of the government of the United States, in an adequately equipped medical clinic or in a hospital approved or operated by the government of the United States or of Guam."

Section 3. § 31.21 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

**"31.21. Providing or administering drug or em-
ploying means to cause an abortion. Every person
who provides, supplies, or administers to any woman,
or procures any woman to take any medicine, drug,
or substance, or uses or employs any instrument or
other means whatever, with intent thereby to cause
an abortion of such woman as defined in § 31.20 of
this Title is guilty of a third degree felony. In addition,
if such person is a licensed physician, the Guam
Medical Licensure Board shall take appropriate dis-
ciplinary action."**

Section 4. § 31.22 of Title 9, Guam Code Annotated, is repealed and reenacted to read:

"31.22. Soliciting and taking drug or submitting to an attempt to cause an abortion. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever with intent thereby to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 5. A new § 31.23 is added to Title 9, Guam Code Annotated, to read:

"§ 31.23. Soliciting to submit to operation, etc., to cause an abortion. Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion as defined in § 31.20 of this Title is guilty of a misdemeanor."

Section 6. Subsection 14 of Section 3107, Title 10, Guam Code Annotated, is repealed.

Section 7. Abortion referendum. (a) There shall be submitted at the island-wide general election to be held on November 6, 1990, the following question for determination by the qualified voters of Guam, the question to appear on the ballot in English and Chamorro:

"Shall that public law derived from Bill 848, Twentieth Guam Legislature (P.L. 20-____), which outlawed abortion except in the cases of pregnancies threatening the life of the mother be repealed?

In the event a majority of those voting vote "Yes", such public law shall be repealed in its entirety as of December 1, 1990.

(b) There is hereby authorized to be appropriated to the Election Commission (the "Commission") sufficient funds to carry out the referendum described in this Section 7, including but not limited to the cost of printing the ballot and tabulating the results. In preparing the ballot, the Commission shall include in the question the number of the relevant public law.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT— FOR THE TERRITORY OF GUAM

Civil Action No. 90-00013

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; GUAM NURSES ASSOCIATION; THE REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; JOHN DUNLOP, M.D.; on behalf of themselves and all other similarly situated, and all their women patients,

Plaintiffs,

vs.

JOSEPH F. ADA, in his individual and official capacities, LETICIA ESPALDON, GEORGE B. PALICAN, ELIZABETH BARRETT-ANDERSON, GLORIA B. NELSON, THOMAS J.M. CALVO, FLORENCIO T. RAMIREZ, LEONILA L.G. HERRERO and MICHAEL F. PHILLIPS, THE BOARD OF DIRECTORS OF THE GUAM ELECTION COMMISSION, in their official capacities, together with all others similarly situated,

Defendants.

NOTICE OF APPEAL

[Filed Nov. 13, 1990]

NOTICE IS HEREBY GIVEN that Defendant Joseph F. Ada hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Denying Motion for Protective Order filed April 4, 1990, the Decision and Order filed on August 23, 1990 and Amended

Judgment filed on October 16, 1990 and which were entered on the docket on April 4, 1990, August 23, 1990 and October 17, 1990, respectively, in the above-entitled case.

DATED this 13th day of November, 1990.

/s/ Katherine A. Maraman
KATHERINE A. MARAMAN
Attorney for Defendant Ada